Tycoon Realty Sdn Bhd v Senwara Development Sdn Bhd

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO S–02–156 OF 1999
NH CHAN, ABU MANSOR AND HAIDAR JJCA
22 MARCH 1999

Civil Procedure *— Appeal — Right of appeal — Application to set aside interim and mandatory injunctions — No final decision on matters in dispute — Whether appealable — Courts of Judicature Act 1964 s 3*

Civil Procedure *— Injunction — Mandatory injunction — Setting aside of — Interim injunction lapsed — Whether court should set aside mandatory injunction upon lapse of interim injunction*

Words and Phrases *— 'From any judgment or order' — Courts of Judicature Act 1964 s 67*

On 9 December 1998, the plaintiff obtained a Mareva injunction ('the interim injunction') together with a mandatory injunction ('the mandatory injunction') against the defendant. On 22 December 1998, the defendant filed an application to have the interim injunction set aside. The judge heard the application on 28 December 1998 and found that as there was nothing to set aside (the order having automatically lapsed), the defendant's application had become academic. He then struck off the defendant's application. The defendant appealed. Counsel argued, relying on *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321, that since the defendant's application to set aside the interim injunction and the mandatory order gives no final decision on the matters in dispute — according to s 3 Courts of Judicature Act 1964 — it is not appealable to this court.

Held, allowing the appeal:

(1) The interim injunction had lapsed by the time the defendant's application to set aside the order was heard (ie on 28 December 1998). However, although the interim injunction had lapsed, there is still the mandatory injunction which may expose the defendant to contempt proceedings if it is not set aside. Therefore, since the order had already lapsed, it is all the more incumbent on the court, upon application made by the aggrieved party (ie the defendant), to have the mandatory order set aside (see pp 699D–700A).

(2) The Court of Appeal has jurisdiction to hear appeals from any judgment or order of any High Court in any civil cause or matter. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in s 3 of the Courts of Judicature Act 1964. This is because, in s 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High

Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties (see p 701G–I); *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321 and *Ang Gin Lee v PP* [1991] 1 MLJ 498 distinguished; *Maleb bin Su v PP* [1984] 1 MLJ 311 overruled.

[Bahasa Malaysia summary

Pada 9 Disember 1998, plaintif telah memperolehi injunksi Mareva ('injunksi interim tersebut') bersama-sama dengan satu injunksi mandatori ('injunksi mandatori tersebut') terhadap defendan. Pada 22 Disember 1998, defendan telah memfailkan permohonan untuk mengketepikan injunksi interim tersebut. Hakim telah mendengar permohonan tersebut pada 28 Disember 1998 dan mendapati bahawa memandangkan bahawa tiada perkara untuk diketepikan (perintah tersebut secara automatik telah luput), permohonan defendan telah menjadi akademik. Hakim kemudiannya telah membatalkan permohonan defendan tersebut. Defendan merayu. Peguamcara bagi plaintif berhujah, bergantung kepada *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321, bahawa memandangkan permohonan defendan untuk mengketepikan injunksi-injunksi interim dan mandatori tersebut tiada memberikan keputusan muktamad berkenaan perkara-perkara yang dipertikaikan, maka — menurut s 3 Akta Mahkamah Kehakiman 1964 — ia tidak boleh dirayu kepada mahkamah ini.

Diputuskan, membenarkan rayuan:

(1) Injunksi interim tersebut telah luput apabila permohonan defendan untuk mengketepikan perintah tersebut didengar (ie pada 28 Disember 1998). Walau bagaimanapun, sungguhpun injunksi interim tersebut telah luput, masih wujud injuksi mandatori tersebut yang boleh mendedahkan defendan kepada prosiding penghinaan mahkamah jika ia tidak diketepikan. Maka, memandangkan perintah mahkamah tersebut telah luput, adalah menjadi kewajipan mahkamah, apabila permohonan dibuat oleh pihak yang terkilan (ie defendan), untuk mengketepikan injuksi mandatori tersebut (lihat ms 699D–700A).

(2) Mahkamah Rayuan mempunyai bidang kuasa untuk mendengar rayuan dari mana-mana penghakiman atau perintah mana-mana Mahkamah Tinggi berkenaan sebarang kausa atau perkara sivil. Ungkapan 'dari mana-mana penghakiman atau perintah' tidak terhad kepada maksud yang diberikan kepada perkataan 'keputusan' dalam s 3 Akta Mahkamah Kehakiman 1964. Ini adalah kerana, di dalam s 67, rayuan-rayuan sivil kepada Mahkamah Rayuan adalah dari 'mana-mana penghakiman atau

perintah' mana-mana Mahkamah Tinggi, sedangkan, di dalam kes rayuan-rayuan jenayah, ia adalah terhadap 'mana-mana keputusan' yang dibuat oleh Mahkamah Tinggi. Tiada wujud alasan untuk mengkehendaki agar maksud perkataan-perkataan 'mana-mana penghakiman atau perintah' diluaskan untuk bermaksud suatu penghakiman atau perintah yang mana akan menyelesaikan secara muktamad hak pihak-pihak (lihat ms 701G–I); *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321 dan *Ang Gin Lee v PP* [1991] 1 MLJ 498 dibeza; *Maleb bin Su v PP* [1984] 1 MLJ 311 diakas.]

Notes

For cases on right to appeal, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 896–898.

For cases on mandatory injunctions, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 2243–2251.

Cases referred to

Ang Gin Lee v PP [1991] 1 MLJ 498 (distd)
Dato' Seri Anwar Ibrahim v PP [1999] 1 MLJ 321 (distd)
Maleb bin Su v PP [1984] 1 MLJ 311 (overd)

Legislation referred

Courts of Judicature Act 1964 ss 3, 50, 67(1)
Rules of the High Court, 1980 O 29 r 1(2B)

Appeal from: Civil Suit No K22–256 of 1998 (High Court, Kota Kinabalu)

M Pathmanathan (*Sonny Durai* with him) (*JNLS Associates*) for the appellant.

Norbert Yap (*Jayasuriya Kah & Co*) for the respondent.

NH Chan JCA (delivering judgment of the court): On 9 December 1998, the plaintiff Senwara Development Sdn Bhd ('the respondent') obtained a Mareva injunction together with a mandatory injunction against the defendant Tycoon Realty Sdn Bhd ('the appellant') in the High Court at Kota Kinabalu in Sabah. As is usual in applications for Mareva injunctions, the application was made ex parte. The ex parte mandatory order that was obtained in addition to the Mareva order reads:

> (2) that the defendants do forthwith disclose the full value of their assets within the jurisdiction of this Honourable Court identifying with full particulars the nature of such assets and their whereabouts and whether the same be held in their own name or by nominees or otherwise on their behalf and in the case of the amount standing in each such account, such disclosure to be verified by an affidavit to be made by its proper officer and served on the plaintiff's solicitors within 14 days after the service of this order upon the defendants.

A On 22 December 1998, the defendant (Tycoon Realty) filed an application to have the ex parte interim injunction set aside. The judge in the court below heard the application on 28 December 1998 and he found that: 'As there was nothing to set aside (the order having automatically lapsed), the defendant's application had become academic'. He then struck off the defendant's application with no order as to costs. The defendant was B dissatisfied with the way the court below had made short shrift of its application and it appealed to this court.

Order 29 r 1(2B) of the Rules of the High Court 1980 ('the RHC'), states:

C > Unless sooner revoked or set aside, an interim injunction obtained on an ex parte application shall automatically lapse at the end of two weeks from the date on which it is granted.

The ex parte interim injunction was obtained on 9 December 1998. We do not know when the order was served on the defendant (although there is a letter from the defendant's solicitor to the plaintiff's solicitor dated D 14 December 1998 which states: 'Our clients are in receipt of the ex parte order of the court dated 9 December 1998'). However, this is not important because O 29 r 1(2B) states that such ex parte interim injunction 'shall automatically lapse at the end of two weeks from the date on which it is granted'. At the time when the defendant's application to set aside the ex parte interim injunction was filed (ie 22 December 1999), the ex parte E order had not lapsed yet, but by the time the application was heard (ie on 28 December 1998) the order had already lapsed.

Although the Mareva injunction had lapsed at the end of two weeks from the date on which it was granted, we must not forget that there is still the other ex parte interim mandatory injunction (although that would have F lapsed too at the end of two weeks from the date on which it was granted) which may expose the defendant to contempt proceedings if it is not set aside. The mandatory order requires the defendant to make full disclosure of all its assets and to state the amount standing to its credit on all its accounts on oath 'and served on the plaintiff's solicitors within 14 days after the service of [the] order upon the defendants'. Unless it is set aside, this G mandatory order is enforceable against the defendant for non compliance of it from the date on which the order was served on the defendant (which was probably on 14 December 1998) because on the date when it was served, the ex parte order had not lapsed yet (it was due to lapse only on 23 December 1998, which was 14 days after it was granted). So that, assuming that the order was served on the defendant on 14 December 1998, H the defendant had 14 days from the date of service to comply with the mandatory order to disclose its assets and accounts. On the date when the order was served on the defendant, the order had not expired yet. It would only expire 14 days after it was granted (ie 14 days after 9 December 1998). Unless the ex parte interim mandatory order is set aside, the order was I effective against the defendant for non compliance, of the order if the defendant had failed to disclose its assets and accounts. In the present case, it is common ground that the defendant up to now has not complied with the order. In our judgment, we are of the view that the court below should

not have made short shrift of the defendant's application. Since the order had already lapsed, it is all the more incumbent on the court, upon application made by the aggrieved party (which in this case is the defendant), to have the mandatory order set aside. Otherwise, we would be faced with the invidious position of seeing contempt proceedings being brought against the defendant for not complying with an order that had lapsed.

The appeal was therefore allowed with the result that the mandatory order was set aside. It was not necessary to make any order or direction on the Mareva injunction as it had already lapsed and, also because there was no suggestion that the defendant in this case had disobeyed it during its existence. As the plaintiff (respondent) had given an undertaking on damages and since it had allowed the ex parte interim injunction to lapse without further proceeding on it, we have ordered the plaintiff to pay damages to be assessed to the defendant. Costs to the defendant here and in the court below.

Before we close with this judgment, we must also deal with a point which counsel for the respondent (plaintiff) had raised before us in order to pre-empt the appeal. Counsel argued that this appeal is not maintainable because we are bound by this court's decision in *Dato' Seri Anwar Ibrahim v PP* [1999] 1 MLJ 321. He contended that the Court of Appeal in the *Anwar* decision has held, at p 329H: 'that a judgment or order which does not deal with the final rights of the parties, but is made pendente lite, and gives no final decision on the matters in dispute, is not a "decision" within the meaning of that word in the current version of s 3 of the Courts of Judicature Act 1964, and therefore is not appealable'. The order of the High Court which struck off the defendant's application and which is now the defendant's appeal, argued counsel, concerned the defendant's application to set aside an interim order for a Mareva injunction and a mandatory order and, therefore, applying *Anwar*'s case, is not appealable to this court.

In our judgment, this submission is misplaced. *Anwar*'s case was a criminal appeal in which s 50 of the Courts of Judicature Act 1964 applies. Section 50 of the Act states:

> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of *criminal appeals*, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any *decision* made by the High Court:
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any *criminal matter* decided by the Sessions Court.
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> (2) An appeal shall lie to the Court of Appeal, with leave of the Court of Appeal, against any *decision* of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any *criminal matter* decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision. (Emphasis added.)

In *Anwar*'s case, this court was dealing with a criminal appeal against a decision made by the High Court. Section 50 of the Courts of Judicature Act applies only to criminal appeals against a decision of the High Court. For the meaning of the word 'decision' in s 50 of the Act, s 3 (as presently conceived) is referred to for its definition. So that, the *Anwar* decision is authority only for criminal appeals to the Court of Appeal against a decision made by the High Court.

Previously, the definition for the meaning of the word 'decision' in s 3 (ie before it was amended by Amendment Act A103 in 1998) read:

> 'decision' includes judgment, sentence or order; ... .

Surely, it is inconceivable to suggest that the phrase 'judgment, sentence or order' could possibly mean a decision that would have the effect of finally determining the rights of the parties. Yet, in the High Court case of *Maleb bin Su v PP* [1984] 1 MLJ 311, it was held that those words mean a decision which would 'finally dispose of the rights of the accused persons'. That cannot be right as that would be adding words to a statutory provision that are not in it. In our view, *Maleb* was wrongly decided and we disapprove it. *Maleb*, however, was an approved obiter in *Ang Gin Lee v PP* [1991] 1 MLJ 498 (SC). Since *Ang Gin Lee* was decided on an order which 'has a final effect and disposes of the right[s] of the applicant' (see *Ang Gin Lee* at p 500), it was unnecessary to the decision in *Ang Gin Lee* to apply *Maleb* which was a decision that had extended the meaning of the words 'judgment, sentence or order' to mean a judgment or order which would finally dispose of the rights of the parties.

Unlike *Anwar*'s case, the instant appeal is a civil appeal in which s 67(1) of the Courts of Judicature Act 1964 applies. Section 67(1) of the Act reads:

> The Court of Appeal shall have jurisdiction to hear and determine appeals from any *judgment or order* of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction, subject nevertheless to this or any other written law regulating the terms and conditions upon which such appeals shall be brought. (Emphasis added.)

It is to be noted that the word 'decision' is not used in s 67(1), so that, there is no compelling reason to refer to s 3 of the Act for its meaning as is in the case of criminal appeals. That being so, the Court of Appeal has jurisdiction to hear appeals 'from any judgment or order of any High Court in any civil cause or matter, whether made in the exercise of its original or of its appellate jurisdiction'. The phrase 'from any judgment or order' is not to be restricted to the meaning given to the word 'decision' in the current version of s 3. This is because, in s 67, civil appeals to the Court of Appeal are from 'any judgment or order' of any High Court, whereas, in the case of criminal appeals they are against 'any decision' made by the High Court. There is no compelling reason to extend the meaning of the words 'any judgment or order' to mean a judgment or order which would finally dispose of the rights of the parties. It is not the business of a court of law to put words into a statutory provision which are not there because to do so would be intruding into the domain of the legislature.

In our judgment we hold, therefore, that the objection to the jurisdiction of this court to hear and determine this appeal is misconceived and misplaced. This court has the jurisdiction to hear and determine any appeal from the High Court in a civil cause or matter.

Appeal allowed.

Reported by Loo Lai Mee